U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 01Mar2002

CASE NO.: 2001-AIR-5

In the Matter of

GEORGE T. DAVIS, Jr. and DIANE DAVIS,
Complainants

v.

UNITED AIRLINES, INC.
Respondent

ORDER DENYING COMPLAINANTS' MOTION TO CONSOLIDATE

BACKGROUND

This matter involves a dispute concerning alleged violations by the Respondent-employer, United Airlines ("United") of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR Act), 42 U.S.C. § 42121, (the "Act"). On February 13, 2001, Complainants, George T. Davis and Diane Davis, filed their complaint, wherein they alleged that Respondent, United, suspended George T. Davis, without pay and later terminated his employment in retaliation for providing information regarding United to the Federal Aviation Administration.

More specifically, Mr. Davis alleges that on September 29, 2000, he found evidence of a hydraulic leak after inspecting an aircraft. Mr. Davis asserted that his supervisor, Larry Cannon, signed off the aircraft as ready for flight, thereby overriding Mr. Davis' safety assessment. Thereafter, Mr. Davis notified the Captain of Flight 437, Kevin Lambeth, of his safety assessment. Mr. Lambeth confirmed the existence of the leak and refused to take off until the leak was fixed, which caused a delay in take-off.

In addition, Mr. Davis alleges that, on November 15, 2000, he discovered a problem with a tire on one of the aircraft and issued an order for the tire to be repaired before take-off. Mr. Davis further alleged that his supervisor, Dan Rash, claimed that the tire did not need to be repaired and cleared the aircraft for take-off. Again, Mr. Davis notified the captain of the aircraft of the status of the tire. The captain then insisted that the tire be changed, which resulted in a one hour flight delay.

On November 15, 2000, United conducted an investigation regarding Mr. Davis'

continuing inability to dispatch his flights on time. As a result of the investigation, United placed Mr. Davis on suspension without pay. On November 30, 2000, United terminated Mr. Davis' employment. Despite Mr. Davis' allegations, United asserts that its decision to terminate Mr. Davis was related to his delay performance over several months and was not the result of the two incidents cited by Mr. Davis. Specifically, United asserts that Mr. Davis' delay performance, a measure of his ability to dispatch trips on time, began to deteriorate to a level below his performance level. United notes that Mr. Davis' delays increased from three per month to over fifteen per month. United concludes that Mr. Davis was terminated on the basis that he was unable to provide a plausible explanation for his decreased delay performance, and therefore, United considered Mr. Davis' conduct an illegal job action aimed to aid the union's effort in the negotiation of a new contract with United.

On December 12, Mr. Davis appealed his termination action. After discussions with the IAMAW union, on December 15, 2000, Mr. Davis was reinstated to the position he occupied prior to November 16, 2000, but he was assigned to a new work area. On December 18, 2000, Mr. Davis returned to work, but he was not paid for lost earnings during his suspension.

Mr. Davis alleges that he was suspended without pay and terminated from his employment in retaliation for providing information and/or causing information to be provided to the Federal Aviation Administration.. Additionally, Complainant, Diane Davis, a United employee in cabin services, alleges that she was retaliated against by United and suffered emotional distress as a result of United's allegedly wrongful conduct towards her husband. United asserts that the only discipline received by Mrs. Davis was the result of her excessive use of sick leave.

Complainants now seek to consolidate this action with *David Lawson and Jodi Lawson v. United Air Lines, Inc*., 2002-AIR-6. On February 19, 2002, Complainants filed their Motion to Consolidate. *Lawson* is currently pending before Administrative Law Judge, Joseph E. Kane.

The allegations in *Lawson* are as follows. Mr. Lawson alleges that he was terminated from employment on April 2, 2001, in retaliation for an incident which occurred on July 6, 2000. Specifically, Mr. Lawson alleges on that date, he and another mechanic, Jim Pommerer, were working on an aircraft when their supervisor, Kevin Hubert, informed the crew that aircraft maintenance had been completed. The crew then activated the aircraft's air conditioning, which allegedly placed Mr. Lawson and Mr. Pommerer in danger. After this incident, an independent investigation was conducted.

To the contrary, United asserts that Mr. Lawson was terminated for multiple violations of IAMAW Rules of Conduct. Specifically, United alleges that Mr. Lawson had been openly and unabashedly abusive and hostile to his management and that his conduct violated the following IAMAW Rules of Conduct:

5. Actual or attempted: a) threatening, b) assaulting, or c) intimidating a Supervisor or other member of management;

22. Refusing to comply with a direct order of a Supervisor or other person in authority;

36. Using abusing language to any employee or members of supervision.

Accordingly, United concludes that Mr. Lawson was terminated, solely on the ground that his conduct violated the IAMAW Rules of Conduct. However, Mr. Lawson contends that other similarly situated employees, who committed the same actions, were treated more favorably.

THE BASIS FOR COMPLAINANT'S MOTION TO CONSOLIDATE

In their Motion to Consolidate, Complainants assert that considerable time will be saved in hearing these cases together, because it will be necessary for Complainants in both cases to present the same evidence of United's alleged unlawful policy of: (a) pressuring line mechanics to defer aircraft repairs contrary to United's written safety policies and FAA Regulations; and (b) disciplining mechanics who reported and/or complained about resulting safety violations and unsafe airplanes. It is Complainants' position that United's alleged unlawful "on time" policy underlies both of the alleged disciplinary retaliations. Complainants further assert that this alleged policy was applied generally to both Complainants.

In addition, Complainants assert that identical testimony from management personnel and other mechanics will be presented twice if separate hearings are held. Moreover, Complainants contend that additional time and expense will be saved, if these matters are consolidated for discovery purposes. Furthermore, Complainants conclude that no party will be prejudiced by the proposed consolidation.

In response to Complainants' Motion to Consolidate, United asserts that *Davis* and *Lawson* are factually different, and therefore, consolidation is improper. Additionally, United notes that Complainants have not id any witnesses, who will be testifying at both hearings. Furthermore, United contends that consolidation of the two cases will delay the hearing, which is scheduled for April 30, 2002.

THE LAW

GENERAL PRACTICE AND PROCEDURE

Consolidation of actions presenting a common issue of law or fact is permitted as a matter of convenience and economy in administration. *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.,*C.A.3d, 1964, 339 F.2d 673. Title 29, C.F.R. Part 18, sets forth the Rules of Practice and

Procedure for administrative hearings before the Office of Administrative Law Judges. With

respect to consolidation, Section 18.11, which is controlling, states in relevant part:

> When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters a issue at each such hearing, the Chief Administrative Law Judge or the administrative law judge assigned may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted.

Similarly, Rule 42 of the Federal Rules of Civil Procedure, which is illustrative, states in relevant part:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

It is well settled that, the courts exercise a broad discretion in the consolidation of actions. *U.S. v. Knauer*, C.C.A. 7 (Wis. 1945), 149 F.2d 519, affirmed 66 S.Ct.1304, 328 U.S. 654, 9 L.Ed. 1500.

In deciding whether consolidation of actions is appropriate, a court must balance savings of time and effort resulting from consolidation against any inconvenience, delay, or expense that it would cause. *Powell v. National Football League*,, 764 F.Supp.1351, (D. Minn. 1991). Although the courts take a favorable view of consolidation, the mere fact that a common question is present, and that consolidation is therefore permissible under Rule 42(a), does not mean that the court must order consolidation. *Continental Bank & Trust Co. v. Ol S.E.D. Platzer*, 304 F.Supp. 228, 229 (D.C. Tex. 1969).

DISCUSSION OF FACTS AND LAW

Based upon the facts presented, I find that consolidation of these two matters is inappropriate pursuant to 29 C.F.R. §18.11. First, Complainants have not set forth sufficient evidence that a common question of law or fact predominates both matters. While Complainants assert that United's alleged unlawful "on time" policy underlies both of the alleged disciplinary retaliations, I do not find merit in this argument, as there is no allegation in *Lawson* that United's alleged "on time" policy, in any way, affected Mr. Lawson's termination. Admittedly, both cases present the common issue whether Complainants were retaliated against by United. Accordingly, Complainants in both cases must satisfy the same statutory requirements [1] to obtain relief,

[1] 49 U.S.C. § 42121 *et. seq*., which is controlling in both cases, is similar to most whistleblower statutes, in that it requires that the complainant establish that: (1) he or she engaged in protected activity; (2) he or she was subject to unfavorable employment action; and (3) a causal connection exists between the protected activity and the adverse action. The burden then shifts to the employer to demonstrate, by clear and convincing evidence, that the employer would have taken the same

however, such a general commonality does not warrant consolidation. More significantly, the facts and circumstances giving rise to each employee's termination from United are apparently quite different. In *Davis*, the issue is whether Mr. Davis' conduct constituted illegal job action, whereas in *Lawson* the issue is whether Mr. Lawson was properly terminated on the basis that his alleged hostile conduct toward management violated the IAMAW Rules of Conduct. It is well settled that consolidation may be denied if the issue of law is not the same. *Maschmeijer v. Ingram*, 97 F.Supp. 639 (D.C.N.Y. 1951).

While Complainants assert that identical testimony from management personnel and other mechanics will be presented twice if separate hearings are held, Complainants failed to identify any of these witnesses. Furthermore, as noted by Counsel for United in *Lawson*, according to the Stipulated Discovery Schedule in the *Davis* case, of the nine witnesses identified in *Davis*, only Frank Krasovic is scheduled to testify in the *Lawson* case. Accordingly, I am not persuaded by Complainants' argument that the consolidation of these cases will relieve the parties from presenting duplicative testimony, either during the trial or deposition.

Additionally, I find that consolidation of these matters would only serve to delay the adjudication of the *Davis* case. In *Davis*, the Complaint was filed on February 13, 2001. The hearing is scheduled for April 30, 2002. In addition, discovery in *Davis* has commenced and is to be completed before April 16, 2002. (See December 18, 2001 Stipulated Discovery Order). In comparison the parties in *Lawson* only recently, on February 19, 2002, filed a Joint Motion for Expedited Discovery and the Respondent in *Lawson* has indicated that it will not be ready for a hearing until after May 15, 2002. Accordingly, I find that the consolidation of these cases would only hinder the expeditious adjudication of *Davis*.

Finally, I find that consolidation of these cases would only produce confusion, prejudice and undue expense. While the Complainants are represented by the same counsel in *Davis* and *Lawson*, United is represented by two different law firms. Accordingly, the consolidation of these two cases would cause undue burden and expense to United, in that United may be forced to incur the additional expense in having its attorneys from both cases attend the depositions and review discovery for both cases, despite the fact that the testimony and evidence would likely only pertain to one case. Furthermore, consolidating these two cases, where there are few, if any, common questions of law or fact, would only cause confusion in the preparation of each party's case and in the presentation of evidence at the hearing.

In conclusion, I find that there is no sufficient legal or factual basis for consolidating these two cases. Furthermore, I find that the consolidation of these two cases would only produce

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unfavorable personnel action in the absence of that behavior.

undue burden, inconvenience and delay, and therefore, consolidation is not warranted under 29 C.F.R. §18.11.

RULING AND ORDER

WHEREFORE, for the reasons set forth above, the Complainants' Motion to Consolidate is hereby DENIED

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RICHARD A. MORGAN
Administrative Law Judge

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